Supreme Court, U.S.
FILED
JAN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1035

In the Supreme Court of the United States

OCTOBER TERM, 1985

CROCKER NATIONAL BANK,

Appellant,

v.

PAUL PERDUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF UNITED STATES NATIONAL BANK OF OREGON AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

JAMES N. WESTWOOD *
WILLIAM H. WALTERS
MILLER, NASH, WIENER, HAGER & CARLSEN
111 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 224-5858

Attorneys for United States National Bank of Oregon

* Denotes Counsel of Record

STEVENS-NESS LAW PUB. CO., PORTLAND, OR. 97204 861

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36.1, United States National Bank of Oregon, a national banking association ("USNB"), submits this brief as amicus curiae in support of appellant's jurisdictional statement. Written consent of the parties accompanies this brief.

USNB is a national banking association. As such it is governed by the National Bank Act (12 U.S.C. § 1 et seq). Thus USNB, like all national banks, has been affected by the federal policy of bank deregulation effected inter alia by the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132, the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469, and by regulations of the Comptroller of the Currency.

Deregulation has heightened greatly the competition in the market area of USNB for demand deposit accounts. Credit unions, savings and loan associations, and brokerage firms now offer such accounts and related services. Like other banks, USNB is sensitive to market conditions. Service charges and fees for USNB functions, including the receipt and operation of demand deposit accounts, are fixed in a competitive environment. The ability of USNB to attract and retain customers is dependent in large measure upon its depositors' receiving maximum benefits at a minimum overall cost.

Processing of nonsufficient fund ("NSF") items is a significant task involving several discrete operations. It is a sizable undertaking: In calendar 1984, USNB processed 593,192 NSF items. For the first 11 months of 1985 (the latest period for which data are available), 539,243 NSF items were processed.

Like appellant, USNB is involved in litigation contesting fees assessed customers who overdraw deposits. In *Best* v. *United States National Bank*, CA A32299 (Or. App., argued September 20, 1985), plaintiffs alleged that USNB's NSF charge was "unconscionable." The trial court granted USNB's motion for summary judgment. Plaintiffs appealed, and the case is pending before the Oregon Court of Appeals. USNB has argued to the Oregon appellate court that federal banking law precludes the state from placing conditions upon a national bank's deposit-related charges and that the supremacy clause thus requires an affirmance of the trial court's ruling.

STATEMENT OF THE CASE

Appellee (the "customer") challenged the fee charged by appellant (the "bank") to customers who write checks on nonsufficient funds. The trial court dismissed the customer's complaint for failure to state a claim. The Court of Appeal for the First Appellate District of California affirmed.

The California Supreme Court reversed. The court held that in signing the required signature card the

customer entered into an enforceable agreement with the bank which entitled the bank to charge a fee for NSF checks. The court further held, however, that the customer's allegation that the bank charged an "unreasonable" or "unconscionable" fee for NSF checks stated a claim on which relief could be granted under California law. The court then addressed and rejected the bank's argument that federal law preempts any such attempt by a state to regulate service fees charged by national banks on deposit accounts.

SUMMARY OF ARGUMENT

The customer has asserted the authority of a California state court to determine whether charges a national bank makes for deposit-related services are reasonable (under tests of the state's own devising). This assertion is incompatible with the powers bestowed upon national banks by the United States Congress and therefore unconstitutional under the supremacy clause of the United States Constitution.

Furthermore, the nationwide importance of this case calls for review and rectification at this time of the state court decision.

ARGUMENT

The California Supreme Court has ruled that federal banking law does not preempt a state's authority to regulate the terms and conditions of a national bank's agreement with its depositors. The California court is mistaken.

As the California court recognizes, section 24 of the National Bank Act authorizes banks to accept deposits. *Perdue* v. *Crocker Nat. Bank*, 38 Cal. 3d. 913, 216 Cal. Rptr. 345, 363 (1985). As the California court all but concedes, section 24 "authorize[s] banks to charge for deposit-related services as an incidental power necessary to carry on the business of receiving deposits * * *." 216 Cal. Rptr. at 363.[1] Particularly since the advent of deregulation, federal policy has allowed — indeed, encouraged — banks to base deposit account service charges on market conditions.[2] There can be little question, therefore, but that federal law precludes state control of a bank's NSF fees. *See Fidelity Federal S. & L. Assn.* v. *de la Cuesta*, 458 U.S. 141 (1982) (state regulation of due-on-sale clause preempted where federal law permitted, but did not require, federal savings and loans to include due-on-sale clause in their contracts).

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[1] The court's language is that this section "may" authorize banks to set fees for deposit-related services.

[2] The Comptroller has explained "[a]ll charges to customers should be arrived at by each bank on a competitive basis" and that "[i]n establishing deposit account service charges, the bank may consider, but is not limited to considering:

"(1) Costs incurred by the bank, plus a profit margin, in providing the service;

"(2) The deterrence of misuse by customers of banking services;

"(3) The enhancement of the competitive position of the bank in accord with the bank's marketing strategy;

"(4) Maintenance of the safety and soundness of the institution." 12 C.F.R. § 7.8000.

This Court consistently has interpreted broadly the powers attendant to a national bank's congressionally provided authority to receive deposits. Thus, for instance, *Franklin Nat. Bank* v. *New York*, 347 U.S. 373, 376 (1954), holds that "[t]he National Bank Act authorizes national banks to receive deposits without qualification or limitation," and therefore a state may not prohibit a bank's advertising of its authorized business. The Court underscored this ruling by emphasizing that state law would be preempted even were it to be shown that the state's citizens were in fact misled by the advertising in question. See also *Easton* v. *Iowa*, 188 U.S. 220 (1902) (a state cannot prohibit an insolvent national bank from receiving deposits).

Nor are the cases relied upon by the California court to the contrary. For example, in *McClellan* v. *Chipman*, 164 U.S. 347 (1896), which upheld the application to a national bank of a state law prohibiting certain transfers of property by insolvents, the Court declared "absolutely void" state laws which "expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the laws of the United States." 164 U.S. at 357. In the instant case, California's assertion of a right to regulate deposit-related charges conflicts with the congressional determination that banks have authority to set charges for deposit-related services and impedes the federal policy of deregulation. As this Court has long recog-

nized, the power to regulate is the power to frustrate. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 315 (1819).

In both *Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1943), and *First Nat. Bank* v. *California*, 262 U.S. 366 (1922), the Court addressed the constitutionality of state laws providing for the escheat to the state of deposit accounts in national banks. *Anderson* upheld state law, whereas the earlier *First Nat. Bank* refused to do so. A distinguishing basis of these decisions, as *Anderson* observed, is the principle that state laws may not affect the contractual relationship of a depositor and a national bank. In *Anderson*, state law allowed escheat "only on proof of abandonment in fact" of the account. 321 U.S. at 252. Because, as the Court explained, "appropriation by the state of property in fact abandoned * * * is * * * as old as the common law itself," escheat worked no alteration of the deposit contract. 321 U.S. at 251. In *First Nat. Bank*, by contrast, a state attempted to enforce a forfeiture of deposit accounts for "mere dormancy." 321 U.S. at 251. This, the Court held, was "incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicil *with the commonly consequent duties and liabilities.*" 262 U.S. at 369 (emphasis added).

The distinguishing principle of *Anderson* and *First Nat. Bank* should be applied to prohibit California from imposing its law upon the terms of the depositor-

bank relationship. As the *First Nat. Bank* Court emphasized in concluding its opinion:

> "This court has often pointed out the necessity for protecting Federal agencies against interference by state legislation. The approved principle of obsta principiis should be adhered to." 262 U.S. at 370.

Finally, the issue posed by this appeal is of nationwide importance. The California decision if left to stand may subject national banks to the patchwork process of state-by-state re-regulation. Amicus, therefore, urges plenary review.

CONCLUSION

The California Supreme Court has wrongly decided an issue of federal constitutional law in a case of sweeping importance to the national banking industry. This Court should note probable jurisdiction and allow briefing and argument.

Respectfully Submitted,

JAMES N. WESTWOOD
WILLIAM H. WALTERS
MILLER, NASH, WIENER,
HAGER & CARLSEN
111 S.W. Fifth Avenue
Portland, Oregon 97204

Attorneys for United States National Bank of Oregon

January 15, 1986